Laborers' International Union of North America, Local Union No. 662, AFL-CIO *and* McCarthy Brothers Company. Case 17-CD-300

14 February 1984

DECISION AND DETERMINATION OF DISPUTE

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

This is a proceeding under Section 10(k) of the National Labor Relations Act, as amended, following charges filed by McCarthy Brothers Company (McCarthy), alleging that Laborers' International Union of North America, Local Union No. 662, AFL-CIO (Laborers) violated Section 8(b)(4)(D) of the Act by engaging in certain proscribed activity with an object of forcing or requiring McCarthy and Hercules Construction Company (Hercules) to assign certain work to employees represented by Laborers rather then to the employees of Barco Office Equipment Co., Enterprise Wholesale, Inc., Famous Barr Commercial Interiors, Exotica, Ltd., Interiors Unlimited, Inc., Rainen Business Interiors, Inc., Samco Business Suppliers, Inc., and Scott Rice of Kansas City, Inc. (collectively called Employers).

Pursuant to notice, a hearing was held before Hearing Officer Roy L. Wimpey on 2 and 3 August 1983 at Jefferson City, Missouri. All parties who appeared at the hearing were afforded full opportunity to be heard, to examine and cross-examine witnesses, and to adduce evidence bearing on the issues.[1] Thereafter, McCarthy and Laborers filed briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has reviewed the rulings made by the hearing officer at the hearing and finds that they are free from prejudicial error. They are hereby affirmed.

Upon the entire record in this proceeding, the Board makes the following findings.

I. THE BUSINESS OF THE EMPLOYER

The parties stipulated, and we find, that McCarthy is a Missouri corporation engaged as a contractor in the building and construction industry. At all times material herein it has been engaged as the general contractor at the Harry S. Truman Office Building in Jefferson City, Missouri. During the 12 months preceding the hearing, McCarthy purchased and received goods and materials valued in excess of $50,000 directly from suppliers outside the State of Missouri. Accordingly, we find that McCarthy is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that it will effectuate the purposes of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

The parties stipulated, and we find, that Laborers is a labor organization within the meaning of Section 2(5) of the Act.

III. THE DISPUTE

A. *Background and Facts of the Dispute*

At the times material herein, Laborers had a collective-bargaining agreement with McCarthy, the general contractor on the Harry S. Truman State Office Building, and employees represented by Laborers worked for McCarthy at the site. Laborers had no collective-bargaining agreement with Hercules Construction Company (Hercules). Hercules was acting as project manager for the State of Missouri on the Truman building project. On 7 June 1983, Hercules' manager, Berg, met with representatives of Laborers. During the meeting, Berg told the Laborers' representatives that the State of Missouri had contracted directly with vendors for the unloading and placement of furniture and related cleanup. Berg explained that certificates of substantial completion would be issued for areas of the building, and that, when they were, the general contractor's responsibility for those areas would end. Berg further explained that since the furniture would go into areas covered by certificates of substantial completion, neither Hercules nor McCarthy would have any control over the assignment of the work. According to Berg, Laborers business representative, Moreau, said that the project was still a construction site, that Laborers claimed the furniture work, and that if employees represented by Laborers were not assigned the work, there would be trouble. Moreau testified that he told Berg the work was Laborers' work, but denied stating that there would be trouble.

On 11 July 1983 McCarthy's general superintendent, Graft, phoned Moreau and asked him what was going on with regard to the furniture. According to Graft, Moreau stated that Laborers claimed the work, that the vendors would be treated as nonunion contractors, and that there would be trouble if they unloaded the furniture into the building. Moreau testified that he said Laborers would probably claim the work but denied stating there would be trouble. Moreau also testified that

[1] Although the Employers were served with notices of hearing, none of them entered an appearance at the hearing.

Laborers still claimed the work at the time of the hearing.

The contracts to supply furniture and to supply the related work, including delivery, installation, and related cleanup, were offered for bids by the State of Missouri. Contracts were awarded to a number of vendors including the eight Employers who were named in the amended charge. Managers from six of the eight Employers testified at the hearing. Donell, director sales for Barco, testified that he and a salesman would do the work.[2] The manager from Scott Rice of Kansas City and the manager from Enterprise Wholesale, Inc., testified that Scott Rice and Enterprise had assigned the disputed work to employees who were represented by Teamsters Local Union No. 838. The remaining three Employers' managers testified that the disputed work had been assigned to the respective Employers' unrepresented employees. A manager from Meyer Custom Interior testified that Famous Barr, one of the remaining two Employers, had subcontracted the disputed work to Meyer and that Meyer had assigned it to its unrepresented employees. Berg testified that Interiors Unlimited, the eighth employer, had assigned the disputed work to its unrepresented employees.

During the hearing, Moreau testified that a Laborers member employed by Frank Jackson Installation had unloaded furniture at the jobsite. Moreau further testified that Frank Jackson Installations was a subcontractor to Check Office Equipment, a vendor originally named in the charge but later deleted with permission from the hearing officer. Berg testified that he saw a portion of the Famous Barr furniture unloaded and placed, and the related cleanup work done, and that the work was not done by members of Laborers.

B. *The Work in Dispute*

The work in dispute is the unloading and placement of office furnishings and related cleanup work at the Harry S. Truman State Office Building in Jefferson City, Missouri.

C. *Contentions of the Parties*

McCarthy contends that there is reasonable cause to believe Laborers violated Section 8(b)(4)(D) and that there is no agreed-upon method for the adjustment of the dispute. McCarthy further contends that the work in dispute should be awarded to the Employers' employees on the basis of company and industry practice, flexibility, efficiency, and employer preference.

Laborers contends that the dispute is not properly before the Board because there are no competing claims to the work in dispute. Further, Laborers contends that there has been no threat or coercion in violation of Section 8(b)(4)(D). Laborers also contends that if the Board has jurisdiction over the dispute then the disputed work should be awarded to the employees represented by Laborers based on area practice, an interunion agreement, disclaimer of the work by Teamsters Local Union No. 833,[3] and the fact that the work is unskilled.

D. *Applicability of the Statute*

Before the Board may proceed with a determination of a dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

Initially, we reject Laborers' contention that there are no competing claims to the work in dispute. As noted above, Berg and the Employers' managers testified that all the Employers had assigned the disputed work to their employees, none of whom were represented by Laborers. Additionally, Berg testified that the he saw part of the disputed work completed by employees who were not members of Laborers. The Board has held that when an employer has assigned disputed work to employees who are not represented by the union claiming the work, there are competing claims. This is so even where the work has not commenced[4] and despite the fact that a union has made no demand on an employer whose employees are performing the disputed work.[5]

We also reject Laborers' contention that no reasonable cause exists to believe Section 8(b)(4)(D) has been violated. Both Berg and Graft testified that Moreau told them, on separate occasions, that Laborers claimed the disputed work and that, if the work were done by others, there would be trouble. Since Moreau denied stating there would be trouble, there is a conflict in testimony. It is well set-

[2] To the extent that unloading and installing furniture and related cleanup is done by an employer's supervisory employees within the meaning of Sec. 2(11) of the Act, the operation may not be the subject of a work assignment dispute. See *Teamsters Local 170*, 240 NLRB 649, 650 fn. 2 (1979), and cases cited therein.

[3] We note that Teamsters Local Union No. 833, by its business agent, Hollandsworth, "disclaimed" the disputed work. The disputed work, however, was assigned to employees represented by Teamsters Local Union No. 838 and to unrepresented employees. Since neither the employees claiming the work nor the employees to whom it was assigned are represented by Teamsters Local No. 833, the "disclaimer" by that Union has no effect on this dispute.

[4] *Stage Employees IATSE Local 659 (King Broadcasting)*, 216 NLRB 860, 862 (1975), and *Operating Engineers Local 2 (PVO International)*, 209 NLRB 673, 675 (1974).

[5] *Longshoremen ILWU Locals 8 and 40 (Port of Portland)*, 233 NLRB 459, 461 (1977).

tled, however, that a conflict in testimony does not prevent the Board from proceeeding under Section 10(k) for, in such cases, the Board is required to find only that there is reasonable cause to believe that the Act has been violated and need not conclusively resolve conflicts in testimony.[6] Additionally, as noted above, Graft further testified that Moreau told him the Employers would be treated as nonunion contractors. Based on the foregoing and the particular circumstances present here, we find reasonable cause exists to believe that a violation of Section 8(b)(4)(D) has occurred.[7]

No party contends, and the record disclosed no evidence showing, that an agreed-upon method for the voluntary adjustment of the instant dispute exists. Accordingly, we find that the dispute is properly before the Board for determination under Section 10(k) of the Act.

E. *Merits of the Dispute*

Section 10(k) of the Act requires the Board to make an affirmative award of the disputed work after giving due consideration to various factors.[8] The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense and experience reached by balancing those factors involved in a particular case.[9]

1. Certification and collective-bargaining agreements

Neither Laborers nor Teamsters Local No. 838 has been certified by the Board as the collective-bargaining representative for any unit of any of the Employers' employees. Although Teamsters Local Union No. 838 represents the employees of two of the Employers involved herein, there is no evidence that Teamsters Local Union No. 838 has a collective-bargaining agreement with any Employer. Further, there is no evidence that Laborers has a collective-bargaining agreement with any of the Employers. Thus, the factors of certification and of collective-bargaining agreements are not helpful to our determination.

2. Employer practice and preference

It is undisputed that the Employers have assigned the unloading and installation of furniture and related cleanup to their respective employees over the periods they had been in business. It is also undisputed that at least some of the Employers have assigned their employees to perform the tasks described above at construction sites. In addition, each Employer prefers to assign the disputed work to its employees for reasons which generally include prior satisfactory experience with those employees and economy. We therefore find that the factor of employer practice favors the award of the disputed work to the Employers' employees. We further find that, although not entitled to controlling weight, the factor of employer preference favors the award of the disputed work to the Employers' employees.

3. Area practice

The record reveals that both the Employers' employees and employees represented by Laborers have unloaded and installed furniture and done related cleanup on several area construction projects. Thus, the factor of area practice is inconclusive.

4. Economy and efficiency of operations

The Employers' managers testified that an award of the disputed work to the Employers' employees would result in greater efficiency because such employees are experienced in following the Employers' procedures, can do the job from beginning to end, know what to do about shipping damage, and are subject to greater control. Laborers presented no evidence that employees represented by it could do the job from the beginning to end or that such employees were familiar with the Employers' procedures. Thus, the factor of economy and efficiency of operations favors an award of the disputed work to the Employers' employees.

5. Relative skills

Exotica, Ltd.'s general manager testified that the handling and placement of the live plants supplied by Exotica, Ltd., required special skill and that Exotica, Ltd.'s employees possessed the necessary skill. Laborers presented no evidence that employees represented by it possessed the necessary skill. With this exception, the record reveals that both groups of employees possessed the requisite skills to perform the work in dispute. We therefore find that the factor of relative skills favors awarding that portion of the disputed work performed by Exotica, Ltd., to Exotica, Ltd.'s unrepresented employees. We further find that the factor of relative skills does not favor an award of the remainder of the disputed work to either group of employees.

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[6] *Operating Engineers Local 139 (McWad, Inc.)*, 262 NLRB 1300, 1302, fn. 6 (1982).

[7] See *Electrical Workers IBEW Local 134 (International Telephone)*, 197 NLRB 879, 883 (1972).

[8] *Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961).

[9] *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1042 (1972).

6. Interunion agreement

Laborers introduced into evidence an agreement between Carpenters District Council of Greater St. Louis and Eastern Missouri Laborers District Council which allocated furniture unloading and installing and related cleanup between employees represented by the two unions. However, since none of the employees to whom the disputed work was assigned are represented by either union, the interunion agreement is not relevant to this dispute.

Conclusion

Upon the record as a whole, and after full consideration of the relevant factors involved, we conclude that the various Employers' employees represented by Teamsters Local Union No. 838 or the various Employers' unrepresented employees are entitled to perform the disputed work. We reach this conclusion based on the Employers' practice, the Employers' preference, the factor of economy and efficiency, and the fact that the Employers' employees possess the requisite skills to perform the disputed work. In making this determination, to the extent we are awarding the work in the dispute to the Employers' employees represented by Teamsters Local Union No. 838, we award the disputed work to such employees but not to that Union or its members. The present determination is limited to the particular controversy which gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. The employees of Scott Rice of Kansas City and of Enterprise Wholesale, represented by Teamsters Local Union No. 838, and the unrepresented employees of Barco Office Equipment Company, Meyer Custom Interior, a subcontractor of Famous Barr Commercial Interiors, Exotica, Ltd., Interiors Unlimited, Inc., Rainen Business Interiors, and Samco Business Supplies, Inc., are entitled to perform the unloading and placement of office furnishings and related cleanup work at the Harry S. Truman State Office Building in Jefferson City, Missouri.

2. Laborers' International Union of North America, Local Union No. 662, AFL-CIO is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force or require McCarthy Brothers Company or Hercules Construction Company to assign the disputed work to employees represented by it.

3. Within 10 days from this date, Laborers International Union of North America, Local Union No. 662, AFL-CIO, shall notify the Regional Director for Region 17 in writing whether or not it will refrain from forcing McCarthy Brothers Company or Hercules Construction Company, by means proscribed by Section 8(b)(4)(D) of the Act, to assign the disputed work in a manner inconsistent with this determination.